October 21, 2022

William Cody
Secretary
Federal Maritime Commission
800 North Capitol Street NW
Washington, DC 20573

Transmitted electronically via email to: secretary@fmc.gov.

Re: Docket No. 22-24, Notice of Proposed Rulemaking

Dear Mr. Cody:

The American Chemistry Council ("ACC") represents more than 190 of America's leading chemical companies. Our members produce and manufacture a wide variety of chemicals, polymers, and related products that make our lives and our world healthier, safer, more sustainable, and more productive. The business of chemistry supports over 25% of the U.S. Gross Domestic Product and directly touches nearly all manufactured goods. Our industry is among the largest exporters in the U.S., accounting for 9% of all U.S. goods exports.

ACC members rely on ocean shipping for both receiving materials and exporting products. Recent supply chain and freight transportation challenges have impacted member operations and heightened concerns about ocean carrier and port operator practices. As a result, ACC welcomes the opportunity to submit these comments concerning the Federal Maritime Commission's ("FMC" or "Commission") Notice of Proposed Rulemaking ("NPRM" or "proposed rule") regarding the Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier.

I. THE NATURE OF A REFUSAL TO DEAL

ACC strongly believes in the importance of free markets and private enterprise and wants all supply chain actors, including Vessel-Operating Common Carriers (VOCCs), to be able to pursue profitable operations. At the same time, it is a privilege for VOCCs to have access to U.S. ports; in order to maintain that access, VOCCs need to carry both imports and exports and not discriminate between them. That was a clear message from the U.S. Congress in its passage of the Ocean Shipping Reform Act ("OSRA 2022"). In fact, the Commission recognized in the preamble that among the bases for OSRA 2022:

> "were the challenges expressed by U.S. exporters trying to obtain vessel space to ship their products… This export-focus arguably is also supported by the amendments to the "Purposes" section of the Commission's overall authority contained in 46 U.S.C. 40101. Specifically, Section 40101(4) ratified the purpose to 'promote the growth and development of United States exports through a competitive and efficient system

for the carriage of goods by water.'"[1]

Congressional intent to provide relief to U.S. exporters needs to be reflected in the rulemaking on unreasonable refusal to deal.

Unfortunately, the proposed rule does not achieve that congressional objective. The proposed rule, which is entitled "Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier" does not actually provide a definition of unreasonable refusal to deal; rather, it asserts that every situation is case- and fact-specific and subject to a weighing of several enumerated factors, as well as potentially other factors that are not listed. What the NPRM does accomplish is to greatly narrow the scope of what may be found to be unreasonable, provide numerous defenses for VOCCs to utilize in justifying their conduct as reasonable, and ignore the negative impacts of such conduct on U.S. exporters.

The NPRM clarifies that "this proposed rule concerns the negotiations or discussions that lead up to a decision about whether an import or export load is accepted for transportation."[2] By covering only contract negotiations and discussions between VOCCs and BCOs, the NPRM leaves a gaping hole that will continue to allow unreasonable conduct by VOCCs, including the *effective* refusal to deal or negotiate. There are many VOCC practices that amount to an effective refusal to deal that the NPRM does not appear to address, for example:

- Not providing export services to ports where there is export demand;
- Providing insufficient vessel space allocations;
- Calling on ports but not alerting exporters to their presence;
- Poorly communicating when vessel schedules change;
- Providing insufficient windows for loading a vessel;
- Blank sailings without providing sufficient notice to exporters;
- Not performing on contracts, including through repeated rolling of export bookings;
- Reducing capacity on certain routes and increasing rates; and
- Providing bookings for less desirable cargo with excessive lead times (e.g., 6-8 weeks out vs. typical 1-3 weeks out).

Not only does the NPRM fail to address these issues, but it could allow VOCCs to claim that these practices are acceptable conduct under the Shipping Act, since they are driven by their business plans and strategies, profit motive, "legitimate" transportation factors, and/or the nature of certain types of cargo.

For example, the Commission notes that it "previously found reasonable those decisions that are connected to a legitimate business decision or motivated by legitimate transportation factors."[3] The Commission recalls that it "has a history of recognizing that it is appropriate to defer to a party's reasonable business decisions and not to substitute its business judgement for

[1] Refusal to Deal NPRM at 57674-57675.
[2] *Id*. at 57676.
[3] *Id*. at 57676.

that of an entity conducting negotiations."[4] It also indicates that it "earlier found that "[a]n ocean common carrier may be viewed as having acted reasonably in exercising its business discretion to proceed with a certain arrangement over another by taking into account such factors profitability and compatibility with its business development strategy".[5]

The regulatory text, coupled with the Commission's discussion on how it intends to interpret the proposed rule, strongly suggests that the rule would not improve the situation for U.S. exporters and may even make things worse. For instance, these statements strongly suggest that a VOCC could decide to accept only the most profitable cargo shipments and still be in compliance with the proposed rule. The Commission cites a case in which it found that the term "reasonable" may mean "ordinary or usual."[6] If providing poor customer service is "ordinary or usual," then this could provide VOCCs with a collective incentive not to change their unreasonable practices, as well as a legal hook to justify them.

The third criterion in the reasonableness analysis, "the existence of legitimate transportation factors," is particularly problematic. The Commission states that it "previously found reasonable those decisions that are "motivated by" such factors,[7] which could include "the character of the cargo, operational schedules, and the adequacy of facilities."[8] It appears from the regulatory text and the Commission's discussion in the preamble that there would be more than enough room for a VOCC to execute blanket policies and procedures that discriminate against shippers based on cargo characteristics, allowing them to claim that specific refusals to deal or negotiate – for instance, where the cargo is hazardous and/or less profitable than other cargo – are reasonable. And the language on "adequacy of facilities" could be used as a rationale by a VOCC for changing its schedule and rolling bookings, based on a claim that there are insufficient numbers of containers or chassis at a given port.

While carriers need scheduling flexibility to accommodate unexpected or unforeseen operational issues, there have to be limits that take into account providing a fair business environment and the potential negative impacts on exporters. The Commission itself notes that "[i]t is well-established" that the "primary objective of the shipping laws… is to protect the shipping industry's customers, not members of the industry."[9] The NPRM needs to be modified to achieve this objective.

To remedy the current imbalance in the NPRM, the Commission should revise the proposed rule to set out the types of conduct constituting unreasonable refusals to deal/negotiate on vessel space. In particular, the following performance factors should be included in the Commission's analysis when it considers whether a VOCC refusal to deal was unreasonable:

- there was a blank sailing with less than 30 days' notice;
- the VOCC did not provide at least 72 hours to load a vessel;

[4] *Id*. at 57677.
[5] *Id*. at 57677.
[6] *Id*. at 57676.
[7] *Id*. at 57676.
[8] *Id*. at 57677.
[9] *Id*. at 57676, citing *New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1374 (D.C. Cir. 1988) (quoting *Boston Shipping Ass'n v. FMC*, 706 F.2d 1231, 1238 (1st Cir.1983)).

- the VOCC rolled a valid export booking; and
- the VOCC refused a booking for hazardous cargo.

Inclusion of such objective criteria would incentivize VOCCs to meet the needs of U.S. exporters, by providing benchmarks for what it means to offer accessible and reliable transportation services that strengthen the competitiveness of U.S. exports and the broader U.S. economy.

Further, the Commission should include a new factor under the reasonableness analysis, specifically consideration of the nature and magnitude of the negative impact of the VOCC's refusal to deal on the cargo owner. Adding this factor would allow the cargo owner to present evidence of negative impacts to bolster its case that a carrier's refusal to deal was unreasonable.[10] Impacts could be measured through a variety of metrics, including lost sales, costs incurred by the cargo owner, the availability (or unavailability, as the case may be) of alternative carriers to the same routes, and the actions taken by the VOCC to mitigate those impacts and help the exporter meet its contract deadlines.

The Commission also needs to insert text that qualifies the second prong of the reasonableness test to clarify that particular provision applies only when there are actual negotiations and discussions between VOCCs and cargo owners. There are many other ways that VOCCs unreasonably refuse to deal through their policies and procedures, and it is critical that the NPRM addresses those types of conduct as well.

II. THE DOCUMENTED EXPORT STRATEGY

In its proposed analysis of whether a refusal to deal or negotiate is unreasonable, the Commission proposes to analyze, as one of the factors, "whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo."[11] ACC is strongly supportive of including this concept as part of the analysis, but we are concerned with how it is implemented in the proposed rule.

Maintaining "the *ability* to transport exports"[12] (emphasis added) as discussed in the regulatory preamble is insufficient for an export strategy to be successful; success would require implementation of such a strategy in a manner that leads to the *actual* movement of goods to export markets. It is also not enough, and even potentially damaging, to indicate that a categorical exclusion of U.S. exports is de facto unreasonable, because it suggests that other VOCC conduct that negatively impacts U.S. exporters may be reasonable. And the reality is that, even without a categorical exclusion, VOCC policies and procedures that collectively

[10] Given the sensitivity of economic data, the cargo owner would retain full discretion to decide what evidence/data to present in support of its case and whether to designate that information as confidential. For the same reason, the Commission should not be able to draw an adverse inference from the fact that a cargo owner did not submit evidence/data on negative impacts in a particular case. There may be sufficient grounds under one or more of the other enumerated factors in the reasonableness test for the Commission to find that a VOCC's refusal to deal was unreasonable.

[11] *Id*. at 57678.

[12] *Id*. at 57675.

amount to an effective refusal to deal under certain circumstances can (and do) have a serious adverse effect on U.S. exports.

ACC has other concerns with the proposed rule. The parameters of a documented export strategy that are included in the preamble are a helpful start, but they are not contained in the rule text itself. They are also not detailed enough to alter VOCC behavior and, in any case, they are only illustrative. Moreover, even if the parameters were included in the regulatory text, having an export strategy is only one prong of a multi-factor test. The Commission could still find that other factors outweigh the lack of such a strategy in certain instances and determine that a refusal to deal was not unreasonable. Most importantly, there is no requirement that the documented export strategy leads to the actual movement of U.S. goods to export markets.

As a consequence, the provision of the reasonableness test addressing the documented export strategy needs to be strengthened, which the Commission could do under a supplementary rulemaking. Specifically, the Commission should develop mandatory minimum standards to be contained in a documented VOCC export strategy. The standards should provide detailed guidance on how to tailor such strategies to specific categories, deal with contingencies, pre-position equipment, and communicate with cargo owners, as well as metrics for determining whether a strategy has been successful. Critically, they should also require the VOCC to track its performance against its export strategy and provide annual public reports that address each of the standards and metrics.

In addition to seeking public input on the minimum standards and metrics, the Commission should solicit and take into account recommendations from the exporters on the National Shippers Advisory Committee, as well as the relevant Industry Trade Advisory Committees administered by USTR and the Department of Commerce, when developing the proposed and final rule. A rule on minimum standards and metrics should also require the Commission to submit to Congress an annual report that evaluates, assesses, and ranks the VOCCs on their compliance with their respective export strategies, both as a whole and on the specific minimum standards and metrics. The draft annual report should be subject to public comment before it is finalized.

Lastly, the Commission should modify this NPRM to include a provision indicating that failure by a VOCC to develop and implement a documented export strategy that is consistent with the minimum standards and metrics, ensures non-discrimination against exports, and leads to the *actual* movement of goods to export markets is sufficient, in and of itself, to establish an unreasonable refusal to deal or negotiate, irrespective of the outcome of the Commission's analysis of the other factors set out in the reasonableness test. In instances where there is an allegation of an unreasonable refusal to deal, the Commission would review the VOCC's implementation of its documented export strategy, with the primary focus on actual export performance, and examine whether the VOCC is complying with that strategy, considering its past and current performance against the minimum standards and metrics and similar performance of other VOCCs.

III. THE SELF-CERTIFICATION PROVISION

In the NPRM, the Commission proposes that once a complainant makes out a *prima facie* case of an unreasonable refusal to deal, the burden would shift to the VOCC to justify that its actions were reasonable, including that it considered a proposal or request in good faith and what criteria it considered. The Commission proposes that this justification may be conveyed through a certification of a representative of the VOCC (which could be the VOCC's compliance officer) "to attest that the decision and supporting evidence is correct and complete."[13]

Certification by a VOCC that its decisions were justified and supporting evidence was correct and complete does not provide any value that would assist the Commission in its analysis. A representative that is employed by a VOCC could evolve into a rubber stamp for providing an after-the-fact justification of an unreasonable refusal to deal.

Consequently, the Commission should either eliminate the certification requirement or clarify in the rule that self-certification by a VOCC would not be determinative in the Commission's analysis of whether or not there was a refusal to deal, or whether a refusal to deal was unreasonable. In addition, because of this inherent conflict of interest and the history of unreasonable VOCC practices, the Commission could also consider whether having the certification performed by an independent third-party certification body might be more appropriate in this case. An independent assessment of the facts, including the relevant documents and records and the impacts of the VOCC's refusal to deal on the cargo owner, would be much more valuable to the Commission than self-certification from a VOCC.

IV. CONCLUSION

When Congress passed OSRA 2022, it made clear that it wanted the Commission to prioritize export promotion in implementing the Shipping Act. That included preventing VOCCs from discriminating against exports. Therefore, it is problematic that the NPRM appears to provide VOCCs with the ability to continue business as usual, even though their unreasonable business practices harm U.S. exporters and their competitiveness in foreign markets. The Commission should modify its proposed rule to eliminate language that seems to allow VOCCs to justify unreasonable refusals to deal. Additionally, the Commission should propose objective criteria that creates presumptions against certain VOCC practices that have harmed, and are continuing to harm, U.S. exporters. The Commission should also ensure that the reasonableness test takes into account the negative impacts of such practices on U.S. exports, as well as whether a VOCC is following its documented export strategy and meeting minimum standards and metrics that take the concerns of U.S. exporters into account.

[13] *Id*. at 57679.

ACC thanks the Commission for its work on this important rulemaking for the chemicals industry and U.S. chemicals exporters. Please do not hesitate to contact us if there are additional opportunities to discuss the NPRM and the recommendations set out in the comments.

Respectfully submitted,

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